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ANG EK KOON v. DIRECTOR, PUBLIC WORKS DEPARTMENT SARAWAK & ORS

COURT OF APPEAL, PUTRAJAYA
UMI KALTHUM ABDUL MAJID JCA
AB KARIM AB JALIL JCA
B RAVINTHRAN PARAMAGURU JCA
[CIVIL APPEAL NO: Q-01(NCVC)(W)-347-05-2018]
30 MARCH 2020

C ***ADMINISTRATIVE LAW:*** *Public officer – Deprivation of promotion – Allegations of – Public officer subjected to investigation following allegations of improper expenditure and abuse of authority – Allegations by public officer that he missed out on promotions to higher salary grades due to being shabbily dealt with in disciplinary proceedings – Whether disciplinary proceedings cause of public officer missing out on promotions – Whether warning letter issued to public officer* D *amounted to punishment – Whether disciplinary proceedings properly convened – Whether public officer entitled to promotion – Whether promotion guaranteed*

In 2008, an audit report revealed alleged improper expenditure and abuse of authority on the part of the appellant, a serving Sarawak Government officer ('audit report'). A Board of Enquiry ('BOE') was set up by the Director, E Public Works Department Sarawak ('first respondent') to investigate the allegations against the appellant and, following an investigation, the BOE decided that there was no evidence to support the allegations. The decision was conveyed to the State Secretary, Sarawak ('second respondent'). In 2009, the appellant applied for promotion to the salary grade of KUP J52. F However, another inquiry was conducted by the Lembaga Siasatan Bebas ('LSB') which consisted of the fourth to sixth respondents and, according to the appellant, the findings of the LSB report referred to the audit report. A show cause letter was issued to the appellant, requesting him to explain why disciplinary proceedings should not be conducted. The appellant then G received a warning letter from the second respondent and this was recorded in his service book. However, no action was taken against the appellant. The appellant commenced an action at the High Court, seeking declarations in respect of the LSB report, the warning letter and for damages for suspending/withholding promotions. According to the appellant, (i) the LSB report, H which denied his promotion to higher salary grades, was made in breach of natural justice as he was not asked to defend himself; (ii) his promotion to KUP J52 should have taken effect on 1 April 2009 and if he had been promoted to such salary grade, he would have been entitled to be promoted to J54 (Jawatan Tambahsentara), J54 and VU7 (Jusa C); (ii) he did not attain promotions to these higher salary grades and was informed that his I application for KUP J52 would be processed if there was vacancy; and (iii) the warning letter was a form of punishment. Dismissing the claim, the High Court Judge ('HCJ') held that (i) the LSB was not a decision-making

body and did not have to accord natural justice to the appellant in preparing its report by giving him the opportunity to explain his actions; (ii) the appellant was not intentionally deprived of promotions despite the delay in conclusion of the disciplinary inquiry; (iii) the issue of promotion was the prerogative of the Public Service Commission and not an entitlement due to the employee; (iv) the second respondent had processed the appellant's promotion application but the appellant failed to attend a compulsory promotion course; and (v) the second respondent was justified in withholding the promotion application as disciplinary proceedings were still pending. Hence, the present appeal. The issues that arose for adjudication were: (i) whether the second respondent had the power/authority to act as a Head of Department to set up the LSB to investigate into the complaint against the appellant; (ii) whether the second respondent had the power under r. 16(1) of the Public Service Commission Rules 1996 ('PSCR') to set the LSB to investigate a complaint against the appellant and to make a report when such power had been exercised earlier by the first respondent in the setting up of the BOE; (iii) whether the LSB's investigations, report and warning letter were illegal, null and void for violation of the rules of natural justice; and (iv) whether the second respondent was justified in withholding the processing of the appellant's application for promotion by reason of pending disciplinary proceedings against him.

Held (dismissing appeal with costs; affirming decision of High Court)
Per Ravinthran Paramaguru JCA delivering the judgment of the court:

(1) The power to institute investigation into the misconduct of a public officer in the management and professional group is provided in r. 16(1) of the PSCR. It vests the power to investigate or cause an investigation to be conducted in the Head of Department only. After the investigation is completed, the 'matter' is to be reported to the second respondent. Rule 16(1) does not leave open the matter of investigation to any other authority. Rule 16(1) of the PSCR is the only statutory provision that must be availed in order to investigate into misconduct of a public officer in the management and professional group with the view of reporting the matter to the second respondent for possible disciplinary action. This is provided in r. 33. The second respondent's role was to report the matter to the Public Service Commission for disciplinary action to be taken against the said officer. (para 20)

(2) The first respondent, in his capacity as the Head of Department of the appellant, had already set up the BOE to investigate the appellant. Therefore, the question of the second respondent holding the designation of the Head of the Department of the appellant at the same time could not arise in the factual matrix of the case. There could not be two Heads of Department in respect of the same officer. The second respondent could not play a dual role as the Head of Department and appoint the LSB to re-investigate the appellant. (para 23)

(3) The action of the second respondent in issuing a warning letter could not be construed as a form of punishment. It was not a form of punishment under r. 174 of the Sarawak State Public Service General Orders 1996. It was clear that apart from investigations conducted by the BOE and the LSB, the appellant was not formally charged with any disciplinary offence or subjected to any form of disciplinary punishment. (paras 25 & 26)

(4) Under the PSCR, a particular post held by an officer or length of service would not guarantee promotion. It is the purview of the Public Service Commission and promotion is based on many factors including personal qualities and merit under r. 7 of the PSCR. The appellant based his claim for damages on the assumption that he would have been promoted to higher grades. However, it was presumptuous on the part of the appellant to plead that he would have been promoted if not for the LSB that was wrongly set up by the second respondent. A promotion is not an entitlement. Although the processing of the promotion application was delayed because of the pending disciplinary investigation, it was not the same thing as saying that the appellant would have been undoubtedly promoted if not for the setting up of the LSB. The basis of the claim contained a considerable element of speculation that in the years between 2010 to the time of the institution of this suit, he would have been definitely promoted from J48 to VU6. (paras 34 & 35)

(5) There was no reason to grant the declaratory prayers. It was clear that the declaratory orders in respect of the LSB was a relief that was sought to aid the principal claim of the appellant for damages for the promotions that he was allegedly deprived of. The LSB report did not result in any form of disciplinary action within the meaning of the Sarawak State Public Service General Orders 1996 or the Sarawak State Public Service Commission Rules 1996 against the appellant. No action was taken against the appellant after the issuance of the show cause letter and the warning letter. Thus, the setting up of the LSB and its report had become academic by the time of the trial. (para 36)

Case(s) referred to:

Chandler v. Alberta Association of Architects [1989] 2 SCR 848 ***(refd)***

Dr Amir Hussein Baharuddin v. Universiti Sains Malaysia [1989] 1 LNS 76 HC ***(refd)***

Komalchand v. State of Madhya Pradesh (1966) AIR MP20 ***(refd)***

Rasiah Munusamy v. Public Service Commission [1967] AC 348 ***(refd)***

Regina v. Parliamentary Commissioner For Administration, Ex-Parte Dyer (1994) 1 WLR 621 ***(refd)***

Legislation referred to:

The Public Service Commission Rules 1996 (Sarawak), rr. 2, 7, 16(1), 33(2)

The State Public Service General Orders 1996 (Sarawak), r. 174(2)

For the appellant - Mekanda Singh Sandhu, Bong Ah Loi, Kalveet Singh Sandhu & Irving Ting; M/s Suhaili & Bong Advocs
For the respondents - Mohd Adzrul Adzlan & Beatrice Minda Ak Winston Bale; SLOs, Sarawak

[Editor's note: For the High Court judgment, please see Ang Ek Koon v. Director Public Works Department Sarawak & Ors [2018] 1 LNS 1912 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Ravinthran Paramaguru JCA:

Introduction

[1] This is an appeal from the High Court after a full trial. The appellant is a serving Sarawak Government officer. His complaint in a nutshell is that he was shabbily dealt with in the course of purported disciplinary proceedings that allegedly resulted in him missing out on promotions to higher salary grades in the Sarawak Civil Service. He has appealed against the dismissal of his suit by the High Court.

Brief Background Facts

[2] The underlying facts of the claim of the appellant were largely undisputed as noted by the learned High Court Judge. All the crucial documents upon which the case of the appellant rested were placed in the common bundle and were not disputed. We shall refer to the evidence that was summarised by the learned High Court Judge. The appellant was appointed to the post of executive engineer/assistant engineer on 30 August 1983. By 31 December 2003, he had attained the salary grade of J48 and held the rank of civil engineer. On 8 July 2009, the appellant was informed by the first respondent that there was a report of alleged improper expenditure and abuse of authority against him by the Internal Audit Department of the State Secretary who is the second respondent. It pertained to the period he worked as divisional engineer at the Sri Aman Divisional Office. In the audit report, it was alleged that the departmental purchases were not done in accordance with established financial procedure in that the said purchases were made when there was no request from the section head and that they were sourced from an unauthorised supplier at a higher price.

[3] A Board of Enquiry (BOE) was set up by the first respondent who is the Director of the Public Works Department to investigate the allegation of misconduct against the appellant. On 21 July 2009, the BOE decided that there was no evidence of collusion or abuse of authority. The decision was conveyed to the second respondent who is the State Secretary on 12 August 2009. On 13 September 2009, the appellant applied for promotion to the salary grade of "KUP J52". He said that he was eligible for the post after he became divisional engineer of the Kuching Division. However, on

7 September 2010, the State Secretary set up a Lembaga Siasatan Bebas (LSB) to conduct another inquiry. It was chaired by the fourth respondent and its members consisted of the fifth and sixth respondents. On 11 October 2010, the LSB produced a report that recommended disciplinary action against the appellant. The damning paragraphs in the LSB report include the following:

> 4.1 Jurutera Bahagian pada masa itu harus dipertanggungjawabkan ke atas perolehan yang tidak mematuhi Arahan Perbendaharaan 176.1 (b) dan (d). Jika telah dikenalpasti berlaku kerugian hasil dari perolehan yang tidak mematuhi arahan di atas maka tindakan mengikut Arahan Perbendaharaan 167.2 dan 322 boleh dipertimbangkan. PSC Rules 15(2) juga perlu dirujuk;
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> 4.2 Walaupun tiada bukti yang nyata ada collusion antara Jurutera Bahagian masa itu dengan pembekal, beliau selaku pengawai yang bertanggungjawab seharusnya diambil tindakan sepertimana yang ditetapkan oleh Arahan Perbendaharaan 167.2 kerana telah mengarahkan perolehan tidak mengikut prosedur diteruskan selaras Arahan Perbendaharaan 176.1 (b), (d) dan Surat Pekeliling Setiausaha Kewangan Negeri 5/2003. Perintah Am 153(4)(f) juga boleh dirujuk.

[4] The appellant alleged that the said findings were made solely by reference to the earlier mentioned audit report of the Internal Audit Division. However, only on 30 November 2012, a show cause letter was sent to the appellant requesting him to explain why disciplinary proceedings should not be conducted pursuant to the LSB report. He replied on 28 February 2012. On 8 May 2014, the appellant received a warning letter from the State Secretary under r. 174(2) of the Sarawak State Public Service General Orders 1996. It was recorded in his service book. Rule 174(2) reads as follows:

> Where the State Secretary is of the opinion that the breach referred to in paragraph (1) does not warrant disciplinary action against the officer, but considers it necessary to issue a warning to the officer as regards the breach, he may issue such warning without referring the matter to the Commission:
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> Provided that such warning shall not be deemed as a disciplinary punishment.

[5] No other action was taken against the appellant. However, the complaint of the appellant is as follows. The appellant testified that he was told that his promotion to KUP J52 should have taken effect on 1 April 2009. He said that if he had been promoted to KUP J52 in 2009, in the normal "scenario", he would have been "entitled" to be promoted to J54 (Jawatan Tambahsentara), J54 and VU7 (Jusa C). However, he did not attain promotion to these higher salary grades. Instead on 7 August 2015, he was informed that his application for the KUP J52 salary grade would be processed if there was a vacancy. He has blamed the LSB report for being

denied promotion to the higher salary grades. He said that the LSB report was made in breach of natural justice as he was not asked to defend himself. He said the warning letter issued to him was a form of punishment.

[6] The appellant sought not only declarations in respect of the LSB and the warning letter but also damages for "suspending/withholding" promotions. The reliefs sought in the statement of claim are as follows:

(1) A declaration that the Lembaga Siasatan Bebas's report dated 11.10.2010 was illegal, null and void in breach of natural justice, fair play and unfairness on the part of the said defendants;

(2) A declaration that the 1st defendant's purported Show Cause Letter dated 30.1.2012 was illegal at law;

(3) A declaration that the 2nd defendant's Warning Letter dated 8.5.2014 purportedly issued under Rule 174(2) of State Public Service General Orders, 1996 was illegal, null and void and that the same be expunged from the Plaintiff's service book;

(4) Further, an order that the purported warning recorded in the Plaintiff's service book is to be retracted, removed, erased and cleared;

(5) Loss and damages arising from unjustly suspending/withholding the Plaintiff's application for Gred J52 KUP/Hakiki since 1.4.2009;

(6) Loss and damages arising from unjustly suspending/withholding of the Plaintiff's post of Jurutera (Awam) Gred J54 (Jawatan Tambahsentara) while serving as the Divisional Engineer JKR, Kuching from 2009 to 2012; LSS post under VU7 (Jusa C) or higher upon his transfer to JKR HQ with effect from 14.2.2012 and promotion from his substantive (Hakiki) grade as Jurutera (Awam) J48 should still proceed to Jurutera (Awam) J52 and thereafter to J54 (Hakiki) and VU7 (Hakiki) from 2009 onwards;

(7) Loss and damages for embarrassment, distress, and duress suffered by the Plaintiff arising from his unlawful suspension and unfair act, lack of response or feedback by the said defendants;

(8) Interest thereon at the rate of 5% p.a. from the 1.4.2009 until full and final settlement;

(9) Exemplary damages;

Findings Of High Court

[7] The learned High Court Judge identified two main issues in the claim of the appellant. The first issue pertained to the role of the LSB in preparing the adverse report on the appellant without calling him to defend himself. The second main issue was in respect of the pleading of the appellant that he missed out on promotions to the higher salary grades of KUP J52, J54 and VU6 (Jusa C) because of the actions of the respondents.

[8] The learned High Court Judge held that the LSB was not decision-making disciplinary body. His Lordship found that it was merely an investigatory body set up under r. 16(1) of the Public Service Commission Rules 1996 of Sarawak. In the premises, he held that the LSB did not have to accord natural justice to the appellant in preparing its report by giving him an opportunity to explain his actions. He also noted that no disciplinary charges were framed by the LSB. He referred to r. 33(2) that states that the State Secretary may refer an officer to the Public Service Commission for disciplinary action to be taken. The Public Service Commission is not a party in this action. It is common ground that the Public Service Commission did not take disciplinary action against the appellant. The learned High Court Judge also found nothing wrong in the setting up of the LSB by the State Secretary to investigate the appellant although the BOE performed the same function earlier and did not recommend any action. He dismissed the argument of double jeopardy as the LSB was not a decision-making body or a *quasi*-judicial tribunal. He also found that the State Secretary did not act in breach of natural justice when he issued the said warning letter.

[9] In respect of the second main issue, the learned High Court Judge found that the appellant was not intentionally deprived of promotions despite the delay in conclusion of the disciplinary inquiry. He firstly held that the issue of promotion is the prerogative of the Public Service Commission and not an entitlement due to the employee. He found that after the issuance of the warning letter which terminated the inquiry, the State Secretary processed the promotion application of the appellant diligently but that the latter failed to attend a compulsory promotion course. He also found that prior to the issuance of the warning letter, the State Secretary was justified in withholding the promotion application as disciplinary proceedings were still pending.

[10] Having answered the main issues against the appellant, the learned High Court Judge wholly dismissed his claim.

Grounds Of Appeal

[11] Counsel for appellant distilled four main issues from the grounds stated in the memorandum of appeal for determination. They are as follows:

(1) whether the 2nd Respondent (State Secretary) had the power/ authority to act as a Head of Department to set up LSB to investigate the complaint against the Plaintiff and to make a report (Ground 3, MOA);

(2) whether the 2nd Respondent (State Secretary) had the power under Rule 16(1) of the Public Service Commission (PSC) Rules 1996 to set up LSB to investigate a complaint against the Plaintiff and to make a report when such power had been exercised earlier by the 1st Respondent in the setting up of BOE (Grounds 3 and 4, MOA);

(3) whether the LSB's investigation and report and the 2nd Respondent's warning letter to the Plaintiff were illegal, null and void for violation of the rules of natural justice (Grounds 4, 5 and 6, MOA).

(4) whether the 2nd Respondent was justified in withholding the processing of the Plaintiff's application for promotion by reason of pending disciplinary proceedings against him (Grounds 8 to 11, MOA).

Setting Up Of LSB

[12] The first three issues are in respect of the LSB that inquired into the complaint against the appellant. The primary argument of the appellant in respect of the LSB is that it was wrongly set up by the State Secretary. It is not in dispute that the first respondent initially set up the BOE to investigate the complaint against the appellant. The BOE found that there was no evidence of collusion with suppliers and abuse of authority on the part of the appellant. Only one year later, the State Secretary set up the LSB to conduct another inquiry. Counsel for respondents submitted that the LSB was properly set up under r. 16(1) of the Public Service Commission Rules 1996. In paras. 19 and 20 of his grounds of judgment, the learned High Court Judge also took the approach that the LSB was set up by the State Secretary under r. 16(1). The provision reads as follows:

> 16(1) Where a Head of Department receives any information or complaint that a public officer in his department, belonging to the Management and Professional Group has committed any act of misconduct or breach of the nature stipulated in rule 15, he shall conduct or cause to be conducted the necessary investigation and report the matter to the State Secretary.

[13] Learned counsel for the appellant on the other hand argued that the State Secretary had no power to set up the LSB to investigate the complaint against the appellant. He submitted that the Head of Department of the appellant in r. 16(1) was the first respondent who was the Director of the Public Works Department. And the first respondent had already set up the BOE to investigate the appellant about a year before the LSB was set up by the State Secretary. But the learned High Court Judge considered r. 2 of the Public Service Commission Rules 1996 which defines "Head of Department" as:

> ... an officer who is in charge of the department, and, **where applicable**, includes the State Secretary, State Attorney General, State Financial Secretary, a Permanent Secretary, Resident of the Division and any officer designated by the State Secretary on the recommendation of the Commission to be or to act as Head of Department. (emphasis added)

[14] Based on the above definition, the learned High Court Judge held that the State Secretary can also play a "dual role" as a "Head of Department" and can therefore set up the LSB. The learned High Court Judge also considered r. 33 of the Sarawak State Public Service Commission Rules 1996 which empowers the State Secretary to report misconduct of a public officer to the Commission. Rule 33 reads as follows:

> 33 (1) Wherever a Head of Department considers it necessary to institute disciplinary action against a public officer for any misconduct or breach of discipline and such misconduct or breach of discipline warrants the dismissal or reduction in rank of the officer, he shall cause a report containing the facts supporting a charge or charges of the misconduct or of the breach of discipline alleged to have been committed by the officer to be sent to the Commission through the State Secretary in accordance with Chapter IV of the General Orders.
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> (2) The State Secretary may, if he becomes aware of any misconduct or breach of discipline has been committed by a public officer which warrants his dismissal from the service or the reduction of his rank, report such misconduct or breach of discipline to the Commission for disciplinary action to be taken against the public officer in accordance with these Rules.
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> (3) The report referred to in paragraphs (1) and (2) shall contain and include all material facts, circumstances, documents and other evidence supporting the allegation of misconduct or breach of discipline made against the public officer (hereinafter referred to as "the accused officer").
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> (4) On receipt of such report, the Commission shall forthwith make such preliminary investigation into the matter or take such action as may be necessary under these Rules to obtain any further or better particulars or evidence (including documentary evidence) from the State Secretary or the Head of Department of the accused officer.

[15] It must be noted that r. 33 pertains to reporting a public officer to the Commission for disciplinary action to be taken whereas r. 16 is in respect of investigation. Thus, as submitted by counsel for the appellant, the issue is whether the State Secretary could set up the LSB under r. 16(1) to further investigate the appellant. He argued that the State Secretary was wrong to set up the LSB to further investigate the appellant because the first respondent in his capacity as the Head of Department of the appellant had discharged that function when he set up the BOE. In other words, the first respondent as the "Head of Department" had a different function under r. 16(1) from that of the State Secretary. His function was to investigate the misconduct of a management and professional group officer in his department and report to the State Secretary. The State Secretary's function was to initiate disciplinary action under r. 33 by reporting any misconduct to the Public Service Commission after receiving the report of the Head of Department under r. 16.

[16] Regardless of the power of the State Secretary to set up the LSB, counsel for the appellant also submitted in the alternative that the investigation by LSB is illegal because of the applicability of the doctrine of *functus officio* in administrative law. The argument is that the power under r. 16 was exhausted and discharged when the BOE made its report and therefore, the LSB's later investigation is illegal. Counsel for appellant cited three cases from other jurisdictions.

[17] In *Chandler v. Alberta Association of Architects* [1989] 2 SCR 848, the Practice Review Board of Architects of the Alberta Association of Architects conducted a hearing to review the practices of a firm of architects that went bankrupt. The Board went beyond its jurisdiction of making recommendations and imposed fines and suspensions. Its decision was quashed. Subsequently, the Board notified the appellants that it intended to continue the original hearing. The appellants objected on the ground of *functus officio*. The Supreme Court accepted that the principle *functus officio* applied to the proceedings but on the facts held that there was no valid disposition by the Board and allowed the proceedings to continue.

[18] In *Regina v. Parliamentary Commissioner For Administration, Ex-Parte Dyer* (1994) 1 WLR 621, the applicant filed a judicial review application to challenge the decision of the Parliamentary Commissioner For Administration not to re-open his investigation against the Department of Social Security. The investigation and the report pursuant to it was done pursuant to a statutory provision. The Court of Appeal upheld the decision of the Commissioner not to re-open the investigation as he was *functus officio.*

[19] In *Komalchand v. State of Madhya Pradesh* (1966) AIR MP20, the Supreme Court of India applied the doctrine of *functus officio* in deciding that once a registration officer registered a document presented to him, he had performed his function and he no longer has any power to examine whether or not it was duly stamped.

[20] In our view, it is not necessary to rule whether the doctrine of *functus officio* applies in Malaysia in the field of administrative law as the issue at hand can be dealt with by reading r. 16 and r. 33 of the Public Service Commission Rules 1996. The power to institute investigation into the misconduct of a public officer in the management and professional group is provided in r. 16(1). It vests the power to investigate or cause an investigation to be conducted in the Head of Department only. After the investigation is completed, the "matter" is to be reported to the State Secretary. Rule 16(1) does not leave open the matter of investigation to any other authority. No other provision in the Public Service Commission Rules 1996 has been cited to us by counsel for the respondents that enables the State Secretary to conduct a similar investigation. In the premises, r. 16(1) is the only statutory provision that must be availed in order to investigate into misconduct of a public officer in the management and professional group

with the view of reporting the matter to the State Secretary for possible disciplinary action. This is provided in r. 33 which we reproduced earlier. The State Secretary's role is to report the matter to the Public Service Commission for disciplinary action to be taken against the said officer.

[21] In the instant case, the first respondent, as the Head of Department, convened the BOE to investigate the appellant. Subsequently, he conveyed the report of the BOE to the State Secretary. As r. 16(1) is the only statutory avenue for the first appellant to set up a body to investigate the appellant, it must be taken that he availed the said provision when the BOE was set up. Thus, when the BOE presented its report, the BOE had discharged its function.

[22] As we stated earlier, counsel for the respondents' position is that the LSB was also set up under r. 16. This was also the finding of the learned High Court Judge. From the evidence gathered by the learned High Court Judge, the LSB performed the same function as the BOE, that is, it investigated the alleged misconduct of the appellant in procuring supplies. Counsel for appellant also submitted that the LSB merely used the audit report prepared by the Internal Audit Division for the purpose of its report.

[23] The learned High Court Judge accepted the argument of the respondents that based on the definition of Head of Department in the Public Service Commission Rules 1996, the State Secretary is also a Head of Department and can therefore set up the LSB. It was pointed out in the court below by counsel for the appellant that the definition provision of "Head of Department" contains the words "where applicable" when it included the State Secretary as a Head of Department. The learned High Court Judge read the words "where applicable" as permitting the State Secretary to play a dual role as a Head of Department for purpose of "ensuring compliance with the Public Service Commission Rules 1996". With respect, we disagree with the construction placed by the learned trial judge on the definition section in question. The definition section is of general application to the whole of the Public Service Commission Rules 1996 and not specifically to r. 16. In the premises, in order to construe the State Secretary as the Head of Department of the appellant who is an engineer in the Public Works Department, there must be evidence in the first place to attract the application of the limiting words "where applicable". In point of fact, the first respondent in his capacity as the Head of Department of the appellant had already set up the BOE to investigate the appellant. This fact was not disputed at the trial. Therefore, the question of the State Secretary holding the designation of Head of Department of the appellant at the same time cannot arise in the factual matrix of this case. Surely, there cannot be two Heads of Department in respect of the same officer. The words "where applicable" may well apply in another factual matrix where the State Secretary is designated as the Head of Department. However, we note that it is not the case here. In the premises, we are minded to agree with counsel for the appellant that the State Secretary

cannot play a dual role as Head of Department and appoint the LSB to re-investigate the appellant. Nonetheless, for reasons which we shall shortly give, this point will not necessarily dispose of the case in favour of the appellant. But first, we shall address other issues related to the function of the LSB.

[24] It was also the appellant's case that natural justice was not accorded to him when the LSB investigated him. In view of our finding that the State Secretary had no power to set up LSB to re-investigate the appellant, this ground is not relevant and is rendered moot. But in the event our reading of r. 16(1) of the Public Service Commission Rules 1996 is wrong and the LSB was properly set up, we agree with learned High Court Judge for the reasons that he gave that it was only performing an investigative function and that it was not a decision-making body. Thus, the question of the LSB according natural justice to the appellant by asking him to explain his actions does not arise. This is clear from the authorities that the learned High Court Judge cited on this point. On the evidence at the trial, it was clear that both the BOE and LSB did not make any decision but merely investigated the complaint against the appellant and prepared a report. No charges were framed against the appellant either. In fact, during the trial, the appellant agreed as noted by the learned High Court Judge that the LSB did not make any decision. For the above reason as well, the plea of double jeopardy has no merit.

[25] The warning letter issued to the appellant is also the subject of complaint in the statement of claim. The action of the State Secretary in issuing a warning letter cannot be construed as a form of punishment. It is not a form of punishment under r. 174 of the Sarawak State Public Service General Orders 1996 which reads as follows:

> 174(1) A breach or contravention of any of the provisions of these General Orders by an officer shall render him liable to disciplinary action in accordance with the Public Service Commission Rules, 1996.
>
> (2) Where the State Secretary is of the opinion that the breach referred to in paragraph (1) does not warrant disciplinary action against the officer, but considers it necessary to issue a warning to the officer as regards the breach, he may issue such warning without referring the matter to the Commission: Provided that such warning shall not be deemed as a disciplinary punishment.

[26] Thus, it is clear that apart from investigations conducted by the BOE and the LSB, the appellant was not formally charged with any disciplinary offence or subjected to any form of disciplinary punishment.

Withheld Promotions And Financial Loss

[27] This is the main complaint of the appellant in the pleaded case. In fact, the main relief sought by the appellant is for damages for not being promoted to the higher salary grades of J52 right up to VU6 (Jusa C). It must be noted that the appellant did not institute judicial review action to obtain prerogative

remedies such as *certiorari* or *mandamus* in respect of the setting up of the LSB, the promotions that he was not given or the notation of the warning letter in the service book. But the appellant claimed damages on the ground that his promotions were intentionally delayed and that he was victimised. Thus, although declarations were applied for to nullify the report of the LSB and invalidate the issuance of the show cause letter and the warning letter, the primary relief sought by the appellant is basically monetary relief based on projected loss of income if he had been promoted within the "normal timeframe" considering his seniority and postings in service.

[28] The appellant testified that he first applied to be promoted to the salary grade of KUP J52 since he was eligible for it after being posted as the Divisional Engineer of Kuching in 2009. He said his application for promotion to KUP J52 was finally processed when the disciplinary investigation ended after the warning letter was issued. He said that he was informed on 30 October 2014 that the Public Service Commission had recommended that his promotion to the KUP J52 salary grade be backdated to 1 April 2009. However, he was informed on 7 August 2015, that his application for KUP J52 could only be processed if there was a vacancy. He also said that he was entitled to be promoted to the salary grades of J54 (Jawatan Tambahsentara) and VU6 (Jusa C) upon his transfer to Public Works Department Headquarters "in line with the normal promotion scenario".

[29] Counsel for the appellant submitted that the ground for not processing the application was "the pending disciplinary proceeding" as stated in the letter of the State Secretary dated 9 October 2012. Thus, he argued that it is the consequence of the illegal setting up of the LSB that deprived the appellant of promotion.

[30] We are mindful that we departed from the finding of the learned High Court Judge that the State Secretary could legally set up the LSB under r. 16(1). Nonetheless, we are of the view that the claim of the appellant for losses arising from the promotions he allegedly missed out must be dismissed. Our reasons are as follows.

[31] The claim of the appellant for damages is premised on the assumption that he would have been promoted to KUP J52, J54 (Tambahsentara), J54 and VU6 (Jusa C) if not for the LSB that was set up by the State Secretary. The learned High Court Judge roundly rejected the notion that the appellant was "entitled" to promotion in any event. He cited a number of authorities that distinguished "eligibility" or "qualification" for promotion from "entitlement" to appointment or promotion.

[32] In *Rasiah Munusamy v. Public Service Commission* [1967] AC 348, the appellant was terminated from his position as an assistant probationary passport officer. His appointment letter stated that he would become eligible for confirmation after three years. His appointment as assistant probationary

passport officer was terminated by the Public Service Commission when it was discovered that he did not pass the School Certificate Examination. His dismissal was upheld by the High Court and the former Federal Court. His further appeal to the Privy Council was dismissed. On the issue of the meaning of eligibility for confirmation, Lord Hodson, speaking for the Privy Council at p. 360, para. F, said as follows:

> "Eligible for" is not equivalent to "entitled to" and means no more than "fit" to be chosen for.

[33] In the case of *Dr. Amir Hussein Baharuddin v. Universiti Sains Malaysia* [1989] 1 LNS 76; [1989] 3 MLJ 298, the appellant was reappointed as Dean for a period of two terms but was not reappointed thereafter. The relevant statutory provision, that is, s. 18(6) of the University's Constitution stated that a Dean is "eligible" for reappointment. In respect of the meaning of eligibility, Edgar Joseph Jr J, at p. 300 (MLJ) para. I, left, said as follows:

> By "eligible", as applied to the selection of persons, means simply "legally qualified" or "fit to be chosen" (per Lord Chelmson in *Baker v. Lee*).
>
> ... Clearly, the applicant was eligible for re appointment as dean and in deed, there was no dispute on this score. However, the fact that he was eligible as such could, in no way, confer upon him an entitlement to that appointment.

[34] In fact, in this case, the learned High Court Judge referred to evidence that established that promotion is not necessarily automatic for holders of a particular post such divisional engineers. A previous holder of the post, one Liew Jiu Ming who was the appellant's immediate predecessor was not given the J54 (Tambahsentara) grade. This evidence was not challenged by the appellant at the trial. The respondents also tendered evidence to the effect that the J54 (Tambahsentara) grade was transferred to the Headquarters of the Public Works Department in 2010 in line with a new departmental policy. Under this policy, only the Assistant Director and Regional Manager would hold the said salary grade. The learned High Court Judge made a finding of fact that the appellant was not intentionally deprived of promotion by this policy. Furthermore, under the Public Service Commission Rules 1996, a particular post held by an officer or length of service will not guarantee promotion. It is the purview of the Public Service Commission and promotion is based on many factors including personal qualities and merit under r. 7 of the said Rules.

[35] In the instant case, the gravamen of the complaint is that the promotion of the appellant was delayed by the LSB and the warning letter which was only issued in 2014. As we noted earlier, the appellant did not pursue public law remedy by way of judicial review to challenge the setting up of the LSB by the State Secretary or the issuance of the warning letter or the notation of it in the service book. We reiterate that the appellant has based his claim for damages on the assumption that he would have been

promoted to Grade J52 (KUP), J54 (Tambahsentara), J54 and VU6 (Jusa C). But we find that it is presumptuous on the part of the appellant to plead that he would have been promoted if not for the LSB that was wrongly set up by the State Secretary. As we stated earlier, promotion is not an entitlement. In the instant case, although the processing of the promotion application was delayed as stated in the letter of the State Secretary dated 9 October 2012 because of the pending disciplinary investigation, it is not the same thing as saying that the appellant would have been undoubtedly promoted if not for the setting up of the LSB. Thus, it would be fair to conclude that the basis of the claim contains a considerable element of speculation, that is, in the years between 2010 to the time of institution of this suit, he would have been definitely promoted from J48 to VU6 (Jusa C).

Conclusion

[36] In the premises, we are of the view that, regardless of the propriety of the setting up of the LSB by the State Secretary under r. 16(1) of the Public Service Commission Rules 1996, there is no legal basis for the principal order that he seeks in this appeal, that is, an order for assessment of damages due to the promotions that he had been allegedly deprived of. We are mindful that the appellant has also sought declaratory orders in this case, principally in relation to the LSB, the show cause letter and warning letter. Although we have disagreed with the trial judge in respect of the legality of the LSB, we see no reason to grant the said declaratory prayers for the following reason. It is clear that the declaratory order in respect of the LSB was a relief that was sought to aid the principal claim of the appellant for damages for the promotions that he was allegedly deprived of. The LSB report did not result in any form of disciplinary action within the meaning of the Sarawak State Public Service General Orders 1996 or the Sarawak State Public Service Commission Rules 1996 against the appellant as correctly found by the learned High Court Judge. No action was taken against the appellant after the issuance of the show cause letter and the warning letter as well. Thus, the setting up of the LSB and its report had become academic by the time of trial. For all the above reasons, we affirmed the decision of the High Court and dismissed the appeal with costs of RM10,000. The deposit was ordered to be refunded.